IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.03.2005

Coram:

The Honourable Mr.MARKANDEY KATJU, Chief Justice

and

The Honourable Mrs.Justice PRABHA SRIDEVAN

W.A.No. 4069 of 2004
and
W.A.M.P.No. 7671 of 2004

G. Bernatsan … Appellant/Petitioner

vs.

1. The District Collector
   Sivagangai District,
   Sivagangai.

2. The Commissioner,
   Panchayat Union,
   Devakottai,
   Sivagangai District. Respondents/Respondents

Appeal filed under Clause 15 of the Letters Patent against the order passed in W.P.No. 35266 of 2002 dated 19.11.2004.

WP No.35266/02: Petition presented under Article 226 of the constitution of India to issue a Writ of Certiorarified Mandamus calling for the records relating to the proceedings of the 2nd respondent in Na.Ka.A1/2136/2001 dated 4.9.2002 and quash the same and consequently direct the second respondent to reinstate the petitioner in service with all attendant benefits.

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For Appellant :::: Mr.R.Thiagarajan
Senior Counsel for
Mr.K.Lavan

For Respondent1:::: Mr.D.Krishnakumar
Special Govt.Pleader

For Respondent2:::: Mr.P.Chandrasekaran

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J U D G M E N T

THE HONOURABLE THE CHIEF JUSTICE

This writ appeal has been filed against the impugned judgment of the learned single Judge dated 19.11.2004.

2. We have heard the learned counsel for the parties, and have perused the impugned judgment and the record.

3. The petitioner/appellant had applied for the post of Pharmacist in Pudukuruchi Siddha Dispensary through the Perambalur District Employment Office, and was called for an interview and short listed for the said post. He joined duty on 01.10.99.

4. Thereafter the Commissioner, Panchayat Union, Devakottai, Sivagangai/second respondent herein wrote letter dated 24.8.99 to the District Siddha Medical Officer, Sivagangai for ratification of the petitioner's appointment. The District Siddha Medical Officer, Sivagangai wrote a reply letter dated 26.8.99 to the Commissioner, Panchayat Union, Devakottai, Sivagangai stating that as per Government letter Naka No.6734/E.M. of 0/1/91-1 dated 12.2.91 the Panchayat Union Commissioner, has got power to appoint qualified persons recommended by the Appointment Committee, and when qualified persons are appointed by the Appointment Committee, the Commissioner cannot interfere with the same, and hence it was stated that approval is not required from him. The petitioner worked from 01.10.99 as Pharmacist in Pudukuruchi Siddha Dispensary, Devakottai till 04.09.2002 i.e., for about 2 years and 11 months. He was given benefits such as increment, bonus, loan, dearness allowance, house rent allowance, etc.

5. Subsequently, the second respondent/Commissioner, Panchayat Union, Devakottai, without giving any show cause notice terminated the service of the petitioner with effect from 04.09.2002 by proceedings Naka.A1/2136/2001 dated 4.9.2002 saying that neither prior sanction from the first respondent/District Collector, Sivagangai was obtained in respect of the petitioner's appointment nor was the said appointment ratified by the Government, and also there was an audit objection.

6. The petitioner contended that under Section 96 of the Tamil Nadu Panchayats Act, the panchayat union council appointment committee has got power to appoint on all posts under the panchayat union council, subject to the provisions of Section 102, and such rules as may be made by the Government on this behalf.

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7. The petitioner contended that the impugned order dated 4.9.2002 was illegal and arbitrary and it was in violation of the principles of natural justice as no show cause notice was issued before passing the same. It is, further, contended by the petitioner that there is no provision either in the Act or Rules empowering the Commissioner, Panchayat Union, Devakottai to terminate the petitioner's appointment. The selection of the petitioner having been made by the Appointment Committee, the second respondent merely gave effect to it. It was alleged that the second respondent has no power or jurisdiction to terminate the service of the petitioner, as he was not the appointing authority.

8. Mr.R.Thiagarajan, learned senior counsel appearing for the appellant, relied on the decision of the Supreme court in Basudeo Tiwary v. Sido Kanhu University and others, (1998) 8 SCC 194 (vide paragraphs 12 & 13), in which it was observed:-

> " In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, rules, statutes and regulations, etc., a finding has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry, the person whose appointment is under enquiry will have to be issued a notice. If notice is not given to him, then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as noticed by this Court in D.T.C.Mazdoor Sabha case (1991 Supp (1) SCC 600). In such an event, we have to hold that in the provision, there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to

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> the Act, statute, rule or regulation etc. and it is only on such a conclusion being drawn, the services of the person could be terminated without further notice. That is how Section 35 (3) in this case will have to be read."

9. Learned senior counsel for the appellant then relied on the decision of a learned single Judge of this Court reported in Govindaswami v. Revenue Divisional Officer, 85 L.W. 531 (vide paragraph 6) wherein it was observed: -

> " There being no power of appointment in the Commissioner and the order of appointment of the petitioner having been issued by the Commissioner only by way of giving effect to the selection made by the Appointment Committee, the proper course which the second respondent should have adopted was to place the matter before the Appointment Committee so that the Appointment Committee could revoke the selection of the petitioner, in which case, it would have been competent for the second respondent to issue necessary proceedings terminating the services of the petitioner."

10. A counter affidavit was filed in the writ petition by respondent no.2/Commissioner, Panchayat Union, Devakottai. In paragraph-3 of the counter affidavit, it was alleged that the post of Siddha Pharmacist fell vacant in Pudukottai Siddha Dispensary. As the said post was not filled up, within the prescribed time, the sanction of the said post stood lapsed. In the reference letter No.Roc.No.71628/F1 dated 10.09.1998 of the Director of Rural Development it was clearly stated that any vacant post other than that of vanishing posts must be filled only adhering to the following conditions:-

(i) The vacant post must become vacant, either by the death or retirement of the individual concerned.
(ii) It must be within a year of such an occurrence of the individual in the post.
(iii) If at all for lapse of one year District Collector's permission is essential for filling up the post.

11. Thus, according to the letter of the Director, Rural Development, as noted above, if a post become vacant then it must be filled up within one year from the date on which such vacancy arose, and if it is sought to be filled

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up after a lapse of one year, the District Collector's permission is essential for filling up the said post. It is alleged that since the District Collector had not given permission, the post had lapsed.

12. In paragraph-4 of the counter affidavit it is stated that the petitioner was appointed purely on temporary basis on 30.8.99 by the second respondent/Commissioner, Panchayat Union, Devakottai, and the same authority i.e., the second respondent terminated his service. Hence, it is alleged that there is no illegality.

13. In paragraph-5 of the counter affidavit, it is stated that the Government had not given permission for the post of Siddha Pharmacist after the sanction of the said post had lapsed. The Director of Rural Development, Chennai in his letter No.25835/98 dated 22.1.2002 directed not to send any ratification proposal for irregular appointments. The appointment made to the petitioner was not followed by communal rotation. Since the appointment of the petitioner was irregular, the said appointment could not be ratified and hence his service was terminated. In paragraph-7 of the counter affidavit, it was alleged that the petitioner was an irregular appointee, and hence not entitled to any show cause notice.

14. In paragraph-8 of the counter affidavit, it is stated that as per G.O.Ms.No.398 (Personnel and Administrative Reforms) dated 12.9.90, any posts filled up after 29.9.99 through employment exchange should strictly follow the communal rotation in the ratio of 1:4. In the case of petitioner's appointment, communal rotation was not followed. In paragraph-9 it is stated that the Assistant Director of Local Fund Audit raised objection against the appointment of the petitioner.

15. The learned single Judge dismissed the writ petition holding that the petitioner's appointment was irregular without any prior sanction from the Government. It was also held by the learned single Judge that the petitioner's appointment was purely temporary, and hence the petitioner cannot claim any right to continue, particularly when the termination order was without any stigma.

16. We agree with the view taken by the learned single Judge. From the facts disclosed above, it is evident that the post had lapsed, and hence the petitioner's appointment was irregular. Moreover, the petitioner's appointment was purely temporary, and it is well settled that a temporary appointee has no right to the post, vide State of U.P. v. Kaushal Kishore Shukla, 1991 (1) SCC 691

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and Triveni Shankar Saxena v. State of U.P, AIR 1992 SC 496.

17. We respectfully disagree with the view taken by the learned single Judge in Govindaswami v. Revenue Divisional Officer, 85 L.W. 531. A perusal of the appointment order of the petitioner dated 30.09.99 shows that the said order was passed by the Commissioner, Panchayat Union, Devakottai. Though the selection was made by the Panchayat Union Council, Devakottai, the appointment order was issued by the Commissioner, Panchayat Union, Devakottai, and the same authority passed the termination order. Thus the authority who issued the appointment order and the termination order is the same. Hence, we find no illegality in the termination order, vide Section 16 of the General Clauses Act.

18. Moreover, it has been clearly stated in the appointment order dated 30.8.99 that the petitioner's appointment is purely temporary. As already stated, a temporary appointee has no right to the post.

19. In Ramakrishna Kamat v. State of Karnataka, AIR 2003 SC 1530, the Supreme Court observed that a person appointed not against any sanctioned post cannot claim regularization of service on the ground of completion of a few years service.

20. We are also of the view that when the initial appointment itself was irregular there was no legal requirement to give opportunity of hearing to terminate it. At any event, we ourselves have given opportunity of hearing to the appellant, and now he can have no grievance on that account.

21. Appointments de hors the rules are invalid as they violate public policy as well as Article 16 of the Constitution, vide Smt.Harpal Kaur Chahal v. Director, Punjab Instructions, (1995) 4 SCC (Supp.) 706; Bhagwan Singh v. State of Punjab and others, (1999) 9 SCC 573; Chancellor v. Shankar Rao and others, (1999) 6 SCC 255; G.Ganesan v. Government of Tamil Nadu, (2005) 1 M.L.J 680 etc.

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22. In view of the above, this writ appeal is dismissed. No costs. Consequently, W.A.M.P.No.7671 of 2004 is also dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

pv/

Copy to:

1. The District Collector
   Sivagangai District,
   Sivagangai.

2. The Commissioner,
   Panchayat Union,
   Devakottai,
   Sivagangai District.

+1cc to the Government Pleader Sr 14307

+1cc to Mr.K.Lavan, Advocate Sr 14100

+1cc to Mr.P.Chandrasekaran Advocate Sr 14056

NG (CO)
km/31.3.

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